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## CAN WE TALK?: A "STEELE-Y" ANALYSIS OF ABA OPINION 411<sup>1</sup>

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**I**N AUGUST 1998, the Committee on Ethics and Professional Responsibility of the American Bar Association issued Opinion 98-411, "Ethical Issues in Lawyer-to-Lawyer Consultation."<sup>2</sup> In this Article, we describe and evaluate the Opinion. We conclude that the Opinion may well contain, as Walter Steele might suspect, more noise than practical consequence. In trying to be practical, and in dealing with a common and traditional practice, the Committee reaches conclusions that are few, based on little authority in the Model Rules, and tenuously supported in

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<sup>1</sup> We write this essay to honor Professor Walter W. Steele, Jr., a fellow teacher of Professional Responsibility at Southern Methodist University School of Law for twenty years until his too-early retirement. Over that time, we have become familiar with, and often appreciate, not only Walter's point of view, but also his inimitable style. To be blunt, as he always is, Walter is both a born skeptic and a plain talker. In this essay, we attempt an appropriately "Steele-y" evaluation of American Bar Association Ethics Opinion 98-411, which we think Walter would view with some skepticism. We choose Opinion 98-411 because it deals with "lawyer-to-lawyer consultation," a topic dear to Walter's heart (if not his pocketbook), since he now practices part-time as a professional legal ethics consultant. We also choose Opinion 98-411 because it raises as many questions as it attempts to answer. We think Walter would agree. After reading the Opinion, he would wag his head, stroke his beard, and drawl, "Now, just a minute. Lemme get this straight. You mean to tell me . . . ?" What would follow might be sarcastic; it would definitely be blunt; and it would demonstrate a thorough and sophisticated command of the theory and practicalities of lawyers' ethical obligations.

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<sup>2</sup> ABA Comm. on Ethics and Professional Responsibility, Op. 98-411 (1998) [hereinafter Op. 411] (ABA/BNA Lawyers Manual of Professional Conduct 101:140 (1998)) (LEXIS, Ethics Library, Fopin File) (WESTLAW ABA-ETHOP database).

other law governing lawyer's obligations to clients and others. The Committee's main intent is not to discourage lawyers' consultations with each other for the benefit of their clients. Its main tactic is to establish, if only by repetition, that a client-lawyer relationship does not arise between the consulting lawyer's client and the consulted lawyer. Thus, if a consulted lawyer makes no promise, he is free of any ethical obligation to the consulting lawyer's client.

## I. THE OPINION: A NEUTRAL DESCRIPTION

The Opinion has three parts, the first describing the forms consultations may take, and the next two parts discussing the problems of the consulting lawyer and the consulted lawyer respectively.<sup>3</sup> The Opinion addresses consultations with lawyers outside the consulting lawyer's firm who are not associated in the representation of this client on this matter. It recognizes the value of consultation, not only to less experienced lawyers with no in-firm colleague in the same area, but also to more experienced lawyers seeking to benefit from the experience and expertise of others. Consultations range from a single question on an abstract issue of law or a point of local practice, through a broad middle range, to a lengthy detailed account of specific facts related to an identified client.<sup>4</sup>

In the Opinion, the major issue for the consulting lawyer is confidentiality. Putting purely legal or informational questions to the consulted lawyer raises no concern of revealing Rule 1.6 information. An anonymous recount of information, or a question posed in hypothetical form, similarly raises no question.<sup>5</sup> In any but the most limited general consultation, however, Ting is revealing information relating to the representation covered by Model Rule 1.6, and therefore must do so within the limits of that Rule. When it is reasonably foreseeable that Ted could later link Ting's client information not otherwise generally known, and the information may prejudice or embarrass the client, Ting must obtain explicit client consent.<sup>6</sup> Further, when Ting seeks to reveal privileged information linked to an identifiable client, she must also seek explicit consent. In any case, cli-

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<sup>3</sup> For convenience's sake, we name the consulting lawyer "Ting" and the consulted lawyer "Ted." For style's sake, we treat Ting as female and Ted as male.

<sup>4</sup> See Op. 411, ¶ 3.

<sup>5</sup> See Op. 411, ¶ 6.

<sup>6</sup> See Op. 411, ¶ 9.

ent consent is the surest safeguard for the consulting lawyer.<sup>7</sup> Aside from that, the Opinion relies upon “impliedly authorized” disclosures.<sup>8</sup> The Opinion concludes that a lawyer is impliedly authorized to reveal information relating to the representation of a client when she reasonably believes the disclosure will further the representation by using Ted’s experience or expertise.<sup>9</sup> The Committee’s advice to a lawyer thinking of consulting another lawyer is to obtain her client’s consent, to be careful not to seek a lawyer who may represent the opposing party, and to obtain the other lawyer’s promises to keep the information confidential and not to undertake representation adverse to her client.<sup>10</sup>

Finally, the Opinion turns to three major questions for the consulted lawyer. First, the Committee, almost too adamantly, opines that no client-lawyer relationship exists between Ting’s client and Ted unless there is an explicit engagement.<sup>11</sup> Second, the Committee concludes that Ted is not obliged to keep Ting’s client’s information confidential unless Ted promises to do so. The promise can be express or implied. A promise of confidentiality is implied either when Ting conditions revealing the information upon confidentiality<sup>12</sup> or when the nature of the information would lead a reasonable lawyer in Ted’s position to conclude that confidentiality was expected.<sup>13</sup> Third, the Opinion warns Ted about obligations to his clients. Ideally, Ted should identify Ting’s client to ensure that there is no conflict with his existing clients. Moreover, Ted must not harm a client by his advice to Ting, and, if Ted does so inadvertently, he must disclose that to his client. Finally, Ted should seek a waiver from Ting’s client so that Ted may represent a client with adverse interests. Absent a waiver, Ted should at least seek Ting’s client’s consent to screening so that Ted’s law firm may undertake adverse representation.<sup>14</sup>

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<sup>7</sup> See Op. 411, ¶ 10.

<sup>8</sup> See MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6 (a) (1998).

<sup>9</sup> See Op. 411, ¶ 5.

<sup>10</sup> See Op. 411, ¶¶ 10-12.

<sup>11</sup> See Op. 411, ¶ 14.

<sup>12</sup> For example, “I have this interesting case. Can I ask you about it, just between us?”

<sup>13</sup> See Op. 411, ¶ 17.

<sup>14</sup> See Op. 411, ¶¶ 19 - 25.

## II. DODGING CONSULTATIONS FOR THE LAWYER'S BENEFIT

At the outset, the Opinion limits the scope of its discussion. The Committee divides legal consultations into two basic categories: consultations for the benefit of the lawyer and those for the benefit of the client. The first category includes consultations by lawyers who represent clients when the lawyers have questions concerning the lawyers' ethical duties vis-à-vis the client. For example, if a lawyer were not getting along with her client, she might call an ethics expert<sup>15</sup> to ask whether she could ethically "fire" the client. This consultation is not to benefit the client, but rather the lawyer. The Opinion, in its own words, "does not necessarily apply to or discuss all of the ethical issues" concerning lawyer-benefit consultations.<sup>16</sup> "Not necessarily" is hedging language<sup>17</sup> obscuring any assistance in this important kind of consulting. Nothing in the Opinion discusses lawyer-benefit consultations explicitly, so it is unclear why the Opinion equivocates. The Opinion either applies or it does not; it appears not.<sup>18</sup>

## III. THE RULES OF "ENGAGEMENT:" WHITHER OPINION 97-407?

The remaining category of legal consultations are those for the benefit of the client. Here, a lawyer seeks ethical or legal

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<sup>15</sup> Experts include law professors, especially those with beards. Walter Steele's ethics consultation practice grew as his beard did.

<sup>16</sup> Op. 411, n.1.

<sup>17</sup> Hedging is a tactic Walter Steele never uses.

<sup>18</sup> As limited, the Opinion does not discuss the ethical duties of the consulted lawyer vis-à-vis the lawyer consulting for her own benefit. The consulting lawyer may well be the consulted lawyer's client in this situation. Unexplored in Opinion 98-411 is whether this kind of consultation could be general enough so as not to create a client-lawyer relationship. If so, it would matter a great deal when the lawyers cross the line into becoming lawyer and client. Another issue, paralleling the discussion in Opinion 411, is whether the consulting lawyer may reveal client information in the course of the consultation, absent client consent. It is hardly plausible that the consulting lawyer is "impliedly authorized" to reveal client information when the consultation is not for the client's benefit. Of course, some ethics consultations could benefit both the consulting lawyer and her client. Whether that is true may depend on the content of the consulted lawyer's advice as well as the purpose of the consultation. See Drew L. Kershen, *The Ethics of Ethics Consultation*, 6 PROF. LAW. 1 (1995).

advice or information<sup>19</sup> that will assist in the representation of a client. For example, the lawyer may seek the advice of an ethics expert on whether there are grounds to move to disqualify opposing counsel. Or the lawyer may seek the advice of a practitioner more experienced in a particular field of law whether a certain theory of recovery could be maintained on a particular set of facts.

After setting aside consultations for the benefit of the lawyer, the Committee further limits the scope of Opinion 98-411 by distinguishing consultations where there is an intent to engage the consulted lawyer's services from those where there is no intent to engage. The Opinion excludes the former kind of consultation from its scope, without explanation.<sup>20</sup> We "suspicion"<sup>21</sup> that the reason for excluding formally engaged legal experts is because the Committee wanted to limit the reach of Opinion 97-407.<sup>22</sup> Opinion 97-407 addresses the ethical duties of lawyers hired as either consulting or testifying legal experts. To an astute and blunt observer, Opinion 97-407 is directly relevant to issues addressed in Opinion 98-411, but the Committee never cites it. If Opinion 97-407 was not deemed relevant to the subject of Opinion 98-411, it may be because the Committee wishes to limit the earlier Opinion to lawyers who are formally retained as experts.

At first blush, Opinion 98-411 seems contrary to Opinion 97-407. Opinion 97-407 takes the position that a lawyer hired to be a non-testifying consulting expert has a client-lawyer relationship with the consulting lawyer's client. This conclusion of Opinion 97-407 has the potential to include every lawyer consulted by another lawyer, no matter how briefly or informally. Clearly, the Committee seeks to avoid this result. Its objective is to keep informal legal consultations as free as possible from ethical restrictions that might discourage a lawyer from seeking ad-

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<sup>19</sup> Information includes a research lead, specific rules of law, or folklore about judges' behavior. Advice, on the other hand, means guidance more tailored to Ting's client's specific needs.

<sup>20</sup> "This opinion discusses the ethical issues raised when one lawyer consults about a client matter with another lawyer who is neither a member of the consulting lawyer's firm nor otherwise associated on the matter, and where there is no intent to engage the consulted lawyer's services." Op. 411, ¶ 2. We assume that by "engage" the Opinion means the explicit formation of a client-attorney relationship with Ted, presumably between Ted and Ting's client.

<sup>21</sup> As Walter would say.

<sup>22</sup> ABA Comm. on Ethics and Professional Responsibility, Op. 97-407 (1997) [hereinafter Op. 407].

vice from another lawyer.<sup>23</sup> To do this the Committee had to limit Opinion 97-407. Creating a relatively "ethics free" consultation zone would be impossible if all consulted lawyers had a professional relationship with the consulting lawyer's client. They tamed Opinion 97-407 by resorting to "engagement." But, as Walter might say, "that ol' dog won't hunt."

First, it is quixotic to posit that the existence of a client-lawyer relationship between Ted and Ting's client is determined by the presence of a formal engagement. It just ain't so. As the Committee itself recognizes in Opinion 97-407, whether a client-lawyer relationship arises is a matter of law beyond the scope of the rules of ethics.<sup>24</sup> Legally, it is clear that the formation of that relationship does not depend upon a formal retention agreement or any other single criterion.<sup>25</sup> Nevertheless, Opinion 98-411 explicitly states that when there is no intent to engage the

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<sup>23</sup> The Opinion states near its conclusion, "This opinion is not intended and should not be interpreted to discourage the practice of consulting between lawyers." Op. 411, ¶ 26. Earlier, it notes that "[S]eeking advice from knowledgeable colleagues is an important, informal component of a lawyer's ongoing professional development. Testing ideas about complex or vexing cases can be beneficial to a lawyer's client." *Id.* ¶ 3. "Even the most experienced lawyers sometimes will find it useful to consult others who practice in the same area to get the benefit of their expertise on a difficult or unusual problem." *Id.* ¶ 2.

<sup>24</sup> ABA Opinion 97-407 recognizes that it is beyond the powers of the Committee on Ethics and Professional Responsibility to declare when a client-lawyer relationship comes into being. It states:

[t]he Model Rules note that 'whether a client-lawyer relationship exists for any specific purpose can depend on the circumstances and may be a question of fact.' Thus, the question whether a testifying expert and the party for whom he is expected to testify have formed a relationship sufficient to invoke the ethical obligations of the Model Rules is generally a question of fact determined by principles beyond those set forth in the Model Rules.

Op. 407, ¶ 7 (quoting MODEL RULES OF PROFESSIONAL CONDUCT, Scope [15] (1983)). Ignoring this disclaimer almost instantaneously, the Committee declares that a testifying legal expert does not have a client-lawyer relationship with the party for whom she is testifying, while a purely consulting expert does occupy "the role of co-counsel in the matter as to the area upon which she is consulted and is subject to all of the Model Rules of Professional Conduct." *Id.*, ¶ 13. It may be unfair to charge the Committee with acting *ultra vires*, for many of a lawyer's professional obligations depend upon the existence of a client-lawyer relationship. Perhaps the Committee should be direct about the legal contingency and phrase its advice in the conditional. For example, "if under the law of the jurisdiction, a client-lawyer relationship exists, then "x", if not, then "y."

<sup>25</sup> See RESTATEMENT OF THE LAW GOVERNING LAWYERS § 26 (Proposed Official Draft 1996):

§ 26. Formation of Client-Lawyer Relationship  
A relationship of client and lawyer arises when:

consulted lawyer, no client-lawyer relationship is formed between the consulted lawyer and the consulting lawyer's client.<sup>26</sup>

Second, the Opinion seems to say that its conclusions hold no matter how much client information is communicated to Ted or how much work Ted does, as long as Ted is not "engaged."<sup>27</sup> Is the Committee saying that, even when he learns sensitive, confidential details of Ting's case and consults at length with Ting's client, Ted cannot be the client's lawyer simply because there is no formal retainer?<sup>28</sup>

This is not to say that Opinion 98-411 might not be perfectly correct in other respects. The Opinion envisions what we call the "quickie consult."<sup>29</sup> The "quickie consult" occurs when a lawyer calls a colleague at another firm or a former law professor to pose a hypothetical situation. The example the Opinion uses is when the lawyer asks a generic legal question of a CLE speaker. The question might grow from a real case, but contains no identifying information. Opinion 98-411 plainly sees no client-lawyer relationship between the answerer and the questioner's client. That seems beyond dispute, although it remains a legal rather than an ethical question, and thus beyond the reach of the Model Rules of Professional Conduct.<sup>30</sup>

To assign a client-lawyer relationship to the consultant based upon whether he is "engaged" is over-inclusive. It is entirely possible that a consultant would accept a fee for a hypothetical consultation. It is not uncommon for lawyers who call their law professors to ask hypothetical questions, to insist that the teacher be paid for her time,<sup>31</sup> especially where the consultation may take hours of discussion and research. It seems that agree-

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(1) a person manifests to a lawyer the person's intent that the lawyer provide legal services for the person; and either

(a) the lawyer manifests to the person consent to do so; or

(b) the lawyer fails to manifest lack of consent to do so, and the lawyer knows or reasonably should know that the person reasonably relies on the lawyer to provide the services; . . .

*Id.* at 8. Comment c. states, "No written agreement is required in order to establish the relationship." See cases cited *infra* note 47.

<sup>26</sup> See Op. 411, ¶ 15. See also, Op. 411, ¶¶ 14, 24, 26.

<sup>27</sup> See Op. 411, ¶ 24.

<sup>28</sup> Rhetorical questions, particularly with a skeptical undertone, although (or perhaps because) disfavored by law review editors, are a staple of Walter Steele's conversation.

<sup>29</sup> See Op. 411, ¶ 3.

<sup>30</sup> See *supra* note 24.

<sup>31</sup> The professor would of course never insist on a fee, at least before retirement.



ing to accept a fee is a trap for the naive law professor. If one agrees with Opinion 98-411's goal of keeping hypothetical consultations as unencumbered as possible by the rules of ethics, then it makes little sense to base the creation of a full-blown client-lawyer relationship upon the payment of a fee. One searches in vain in Opinion 98-411 for a way to keep the paid hypothetical consultation from falling into the clutches of Opinion 97-407's client-lawyer relationship. Take the money and you can't run.<sup>32</sup>

#### IV. THE MIDDLE GROUND: ETHICAL SWAMPLAND?

The Opinion identifies a broad middle ground between the "quickie consult" and the formal engagement. Ting may reveal varying amounts of confidential client information, ranging from merely identifying the client to imparting detailed case information and privileged communications to Ted, even though not engaged. It is on these middle cases that the Opinion focuses most of its discussion.

The Opinion recognizes that in these middle cases, even without a client-lawyer relationship, things can get ethically tricky. Information Ting learns as a result of her representation is confidential under Rule 1.6. This information includes privileged communications and unprivileged information learned in the course of representing the client. The latter category of information includes the client's identity. Knowing that lawyers who consult others on legal questions often must reveal Rule 1.6 information to ensure that the advice takes into account all relevant information, and that, often, consulting lawyers do not obtain their client's consent to these disclosures, the Opinion explores the territory of "impliedly authorized" disclosures.<sup>33</sup>

#### V. TING'S IMPLIED AUTHORITY: CAN SHE TALK?

The Opinion first seems to create a hitherto unknown exception to the duty of confidentiality. In discussing the position that the client's identity, though rarely privileged under evidentiary rules, is usually confidential under Rule 1.6, the Opinion states that "if it is public knowledge [for example] that a lawyer

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<sup>32</sup> One way out is to interpret Opinion 407 as imposing a client-lawyer relationship only upon the paid legal expert who becomes an integral part of the client's legal team, not merely someone consulted "in passing." This raises obvious difficulties in line-drawing.

<sup>33</sup> See Op. 411, ¶¶ 4 - 5.

represents a particular criminal defendant, the defense lawyer may reveal that fact in a consultation without violating Rule 1.6, although disclosure of other facts not publicly known may be a violation.”<sup>34</sup> This seems to say that information learned in the course of representing a client is not covered by Rule 1.6 if it is publicly known. Whoa, Bubba. The Rule contains no such exception.<sup>35</sup>

It is not correct to say that confidential information of a current client is not protected by Rule 1.6 if the information is “public knowledge” or “generally known.” A lawyer is not free to disclose client information just because it is public knowledge. Given the context of the reference to publicly known client information, however, the Opinion may mean merely that the determination whether a lawyer is impliedly authorized to reveal Rule 1.6 information may depend in part upon whether the information is public. Often lawyers must decide during the consultation what information to disclose and what to withhold in order to receive useful advice. It is not practical for the lawyer to obtain client consent in advance to the disclosure of all necessary facts. Ting may not know what information Ted needs to render a useful opinion. Public access to the information is one factor Ting may consider when deciding whether she is impliedly authorized to reveal client information.

Eschewing<sup>36</sup> the easy out by saying that all disclosures to Ted for the benefit of Ting’s client are impliedly authorized under Rule 1.6(a) “in order to carry out the representation,” the Opinion limits Ting’s implied authority to disclose. While these limits are practical, even common-sense, they are fabricated out of whole cloth. The Opinion cites no rules, opinions, case law, or commentary to support its conclusions.<sup>37</sup>

The Opinion holds that the lawyer is not impliedly authorized to reveal client information not publicly known if disclosure would prejudice or embarrass the client.<sup>38</sup> Disclosing such information without the client’s consent, says the Opinion, may vio-

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<sup>34</sup> Op. 411, n.6.

<sup>35</sup> If the Committee really means what it says, it seems to have grafted a concept from Rule 1.9(c)(1) onto Rule 1.6. Rule 1.9 allows a lawyer to use information relating to the representation of a former client to the disadvantage of the former client if the information “has become generally known.” MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.9 (1998).

<sup>36</sup> Do not see *supra* note 21.

<sup>37</sup> See Op. 411, ¶¶ 8 - 9.

<sup>38</sup> See Op. 411, ¶ 8.

late the duty of confidentiality under Rule 1.6. This is an unremarkable comment, but unsupported by the Rule or other authority.<sup>39</sup> Does this mean that Ting is impliedly authorized to reveal information harmful to her client as long as it is public knowledge, or non-harmful information that is not?<sup>40</sup> It is not clear that the answer to these essential questions is, "yes."

In the next paragraph, the Opinion adds another limit to Ting's implied authority to disclose client information. It says, "If . . . the [consulting lawyer] . . . is likely to reveal information that would prejudice the client or that the client would not want disclosed, then he must obtain client consent for the consultation."<sup>41</sup> Here the Opinion seems to distinguish between prejudicial and non-prejudicial information that "the client would not want disclosed." We suppose that it is possible that Ting could somehow understand that the client would not want her to reveal certain information that is not prejudicial but nevertheless private or embarrassing to the client or others, but this limit seems merely to state a truism: a lawyer is not impliedly authorized to reveal information that the lawyer knows (or suspects?) the client would not want disclosed. Perhaps the Committee, abundantly cautious, thought it best to make this explicit. The caution may not be misplaced, since Ting is discussing the client's matter with Ted without telling her client.

Finally, the Opinion sketches the limits of Ting's implied authority: "When the consulting lawyer determines that the consultation requires disclosure of client information protected by the attorney-client privilege or that foreseeably might harm the client if disclosed, the lawyer must assure that the client is made aware of the potential consequences of the disclosure and that the client grants permission to consult the other lawyer."<sup>42</sup> The Opinion notes that the unauthorized disclosure of privileged information might amount to a waiver of the privilege. For that

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<sup>39</sup> The Committee seems to be alluding to DR 4-101's definition of a client "secret," that is, unprivileged "information gained in the professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client." MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 4-101(A) (1980).

<sup>40</sup> Another "Steele-y" rhetorical question.

<sup>41</sup> Op. 411, ¶ 9.

<sup>42</sup> Op. 411, ¶ 10. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6 (b)(1)(1983).

reason, the Opinion flatly states that a lawyer does not have implied authority to disclose privileged information.<sup>43</sup>

Distilling the Opinion's statements into a rule of implied authority to disclose, the Opinion seems to say that, without express client consent, a lawyer has implied authority to reveal any information relating to representation of a client if it would assist the lawyer in carrying out the representation of the client, unless (1) the information is not public knowledge and disclosure may prejudice or embarrass the client; (2) the client would not want the information disclosed; (3) the information is protected by client-attorney privilege; or (4) the client expressly instructs the lawyer not to reveal the information. Limit (1) merely contains factors bearing on limit (2), that is, the lawyer's decision whether the client would not want the information revealed. Exception (4), not discussed in the Opinion, is added because it is obvious and the Opinion should have included it.<sup>44</sup>

#### VI. WALKIN' THE LINE<sup>45</sup> BETWEEN OPINIONS 90-358 AND 97-407

The Committee is not only concerned about Ting's obligation of confidentiality, but also whether Ted has duties grounded in Rule 1.6. First, the Committee considers Ting's client's beliefs

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<sup>43</sup> The Opinion must address the danger of waiver because it concludes that, unless Ted is retained as such, he does not act as a lawyer for Ting's client. If there were a client-lawyer relationship, the waiver problem disappears. The Opinion does not discuss the possibility that disclosure of privileged information to the consulted lawyer, as a sub-agent or representative of the consulting lawyer, may continue to be protected within the consulting lawyer's attorney-client privilege. See *United States v. Schwimmer*, 892 F.2d 237 (2d Cir. 1989) (accountant); *United States v. Kovel*, 296 F.2d 918 (2d Cir. 1961) (accountant); *Mendenhall v. Barber-Greene Co.*, 531 F. Supp. 951 (N.D. Ill. 1982) (foreign patent agent); *In re Bieter Co.*, 16 F.3d 929 (8th Cir. 1994) (independent consultant found to be a representative of the client in dealing with counsel); Uniform Rule of Evidence 502, 510 (1986). Because jurisdictions may differ on this and the issue is intensely factual, the Opinion does not assume that disclosures in the course of a legal consultation are protected by the privilege.

<sup>44</sup> Unlike Disciplinary Rule 4-101 of the ABA MODEL CODE OF PROFESSIONAL RESPONSIBILITY, Rule 1.6(a) does not explicitly state that a lawyer may not reveal information the client has expressly forbidden the lawyer to disclose. See *supra* note 39. However, comment [7] to Rule 1.6 states, "A lawyer is impliedly authorized to make disclosures about a client when appropriate in carrying out the representation, except to the extent that the client's instructions or special circumstances limit that authority." MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6 cmt. 7 (1998).

<sup>45</sup> JOHNNY CASH, *I Walk the Line* (Sun Records 1956) (also recorded by more than 100 other artists, but the original would be Walter's favorite).

about Ted's duty of confidentiality. The Opinion ventures, "[i]f the client's consent to the consultation was sought and obtained, the client may have a reasonable expectation that the disclosure will go no further than the consulted lawyer and will not be used adversely."<sup>46</sup> The "reasonable expectation" language sounds like the criterion used when a client-lawyer relationship is found between a putative client and an attorney who claims not to have entered a relationship.<sup>47</sup> Nevertheless, the Opinion steadfastly refuses to find a client-lawyer relationship between Ted and Ting's client. According to the Committee, Ting's client cannot reasonably conclude that Ted is her lawyer, but she may reasonably conclude that Ted must keep her information confidential.<sup>48</sup> We are left to guess exactly how the client is protected by her "reasonable expectation" of confidentiality. The Opinion declares that, absent a promise, Ted has no obligation to keep the information confidential. Ting's client must hope that Ted is a generous stranger who just happens to be discreet.

One possible way to protect Ting's client would be to analogize to Opinion 90-358.<sup>49</sup> This approach is foreclosed by the committee. Opinion 98-411 states, "[t]he reasonable expectations of a prospective client that support the imposition of a duty of confidentiality when the lawyer is consulted about a pos-

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<sup>46</sup> Op. 411, ¶ 13.

<sup>47</sup> See RESTATEMENT OF THE LAW GOVERNING LAWYERS § 26, *supra* note 25. Comment b. to § 26 states, "A lawyer may be held to [the] responsibility of representation when the client reasonably relies on the existence of the relationship." Comment e. to § 26 states, "Even when a lawyer has not communicated willingness to represent a person, a client-lawyer relationship arises when the person reasonably relies on the lawyer to provide services, and the lawyer, who reasonably should know of this reliance, does not inform the person that the lawyer will not do so." See also, *In the Matter of Anonymous*, 655 N.E.2d 67, 70 (Ind. 1995); *Togstad v. Vesely, Otto, Miller & Keefe*, 291 N.W.2d 686 (Minn. 1980); *Rice v. Forestier*, 415 S.W.2d 711 (Tex. Civ. App.-San Antonio 1967, writ *ref'd n.r.e.*).

<sup>48</sup> See Op. 411, ¶ 14.

<sup>49</sup> ABA Comm. On Ethics and Professional Responsibility, Formal Op. 90-358 (1990) found that confidential communications made to a lawyer by a prospective client are protected by Rules 1.6 and 1.7 even when the lawyer is not ultimately retained by the prospective client. To the same effect is RESTATEMENT OF THE LAW GOVERNING LAWYERS § 27 and the following cases: *Westinghouse Electric Corp. v. Kerr-McGee Corp.*, 580 F.2d 1311, 1319 & n. 12 (7th Cir. 1978), *cert. denied*, 439 U.S. 955 (1978); *First American Carriers, Inc. v. Kroger Co.*, 787 S.W.2d 669 (Ark. 1990); *Liesman v. Liesman*, 617 N.Y.S. 2d 807 (N.Y. App. Div. 1994); *Desbiens v. Ford Motor Co.*, 439 N.Y.S. 2d 452 (N.Y. App. Div. 1981). See also *Ainsworth Electric Co. v. Alcatel Canada Wire Inc.*, 40 O.R.3d 123 (Ont. Ct. Gen. Dev. 1998).

sible representation cannot be said to exist in lawyer-to-lawyer consultations in which the client is not directly involved.”<sup>50</sup> Here Opinion 98-411 tries to walk a tightrope between Opinion 90-358, imposing a Rule 1.6 duty of confidentiality on a lawyer initially consulted by a potential client, and Opinion 97-407, imposing a client-lawyer relationship on a retained legal consultant. The premise for not finding that Ted has a Rule 1.6-based obligation of confidentiality to Ting’s client is that the client is not “directly involved.” “Direct involvement,” however, is not a necessary element of a client-lawyer relationship.<sup>51</sup> It is odd that it is a prerequisite for a Rule 1.6 obligation of confidentiality. We find this analysis as leaky as a bad bait bucket.

Let’s see if we got this straight.<sup>52</sup> Opinion 98-411 says that Ting’s client’s information is protected if Ted is formally engaged as a consultant.<sup>53</sup> Without that engagement, somehow the information may still be protected if Ting’s client has a reasonable expectation that Ted will keep it confidential. Ting’s client’s expectation might be reasonable if she consents to the consultation or is directly involved in it. Otherwise, Ted is not only not a lawyer for Ting’s client, he has no ethical duty of confidentiality. Sounds as if the Committee wants to make sure that Ted is a tough fish to hook. That same hook poses great danger to Ting.

## VII. PROMISES, PROMISES<sup>54</sup>

The Committee tries to reassure Ting, stating that “[s]ome protection for a client may be afforded by obtaining the consulted lawyer’s agreement to hold information in confidence” and not to engage in adverse representation.<sup>55</sup> The Opinion

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<sup>50</sup> Op. 411, ¶ 16.

<sup>51</sup> *Clarke v. Ruffino*, 819 S.W.2d 947 (Tex. App.-Houston [14th Dist.] 1991, writ dismissed w.o.j.); *Insurance Company of North America v. Westergren*, 794 S.W.2d 812 (Tex. App.-Corpus Christi 1990, no writ); *Howard v. Texas Dep’t Human Serv.*, 791 S.W.2d 313 (Tex. App.-Corpus Christi 1990, no writ). ABA Opinion 97-407 recognizes that an attorney-client relationship can exist between a client and a lawyer who has agreed only to consult, not to represent the client at any proceeding. This conclusion does not seem to depend upon whether the client is directly involved with the consultant.

<sup>52</sup> Do not see *supra* note 36.

<sup>53</sup> See Op. 411, ¶ 17.

<sup>54</sup> NEIL SIMON, *Promises, Promises* (1968) (lyrics by Hal David, music by Burt Bacharach) (one of Walter’s favorite musicals).

<sup>55</sup> Op. 411, ¶¶ 11 - 13. The Opinion recognizes that the existence of an engagement agreement does not determine whether the attorney-client privilege is waived. However, in most cases, communications with a formally engaged, non-

does not discuss how such an agreement might afford the client some protection. If Ted is not formally engaged, it is not clear how Ting's client is legally or ethically protected by Ted's naked promise of confidentiality. If Ted were to break his promise, what recourse would Ting's client or Ting have? Would Ted violate a Model Rule of Professional Conduct? Would Ting's client win a motion to disqualify Ted from adverse representation? Would Ted be liable in a civil action?<sup>56</sup>

The Opinion is particularly opaque as to the source of Ted's ethical duties once he has promised confidentiality. It says, "A consulted lawyer who has not expressly or implicitly agreed to maintain the confidentiality of client information acquired in a consultation should not be found to have breached an ethical duty under Rule 1.6 if she later discloses or uses the information."<sup>57</sup> The clear import of this sentence is that a lawyer who has expressly or implicitly agreed to keep the client information confidential would breach Rule 1.6 if she later reveals the information. But this cannot be true. Rule 1.6 imposes a duty of confidentiality only upon lawyers who have gained information in the course of representing a client.<sup>58</sup> Opinion 98-411 assumes that Ted is not representing Ting's client. In this back-hand way, the Committee attempts to blanket Ting's client with Rule 1.6 when Ted promises confidentiality, but leaves out in the cold Ting's client who has no promise, but only reasonable expectations. The Committee does not share how reasonable expectations afford "some protection," nor how much "some" is.

The Opinion suggests that Ted will be obliged<sup>59</sup> to keep Ting's client's information confidential not only if Ted expressly promises, but also if Ted's promise "can or should" be inferred from the circumstances.<sup>60</sup> The first example of an inferred

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testifying consultant are within the consulting attorney's client-lawyer privilege. See *supra* note 43.

<sup>56</sup> Ted may have fiduciary duties to Ting's client under agency law. While the Opinion does recognize this at one point, citing the RESTATEMENT (SECOND) OF AGENCY, it does not do so here. See *infra* note 66 and accompanying text.

<sup>57</sup> Op. 411, ¶ 18.

<sup>58</sup> ABA Opinion 90-358 creates an exception to this. ABA Comm. on Ethics and Professional Responsibility Opinion 90-358 (1990). See *supra* note 49. There the Committee found that the Rule 1.6 duty of confidentiality applies to confidences conveyed to a lawyer consulted by a prospective client even if a client-lawyer relationship is not formed. However, in Opinion 98-411, the Committee refuses to apply the protections of Rule 1.6 to the confidences of the party not directly involved in the consultation. See Op. 411, ¶ 16.

<sup>59</sup> But, perhaps not by the Model Rules of Professional Conduct.

<sup>60</sup> See Op. 411, ¶ 17.

agreement is exceedingly modest: Ting expressly conditions the consultation on confidentiality and Ted proceeds. The second example is exceedingly vague: the nature of the information disclosed would lead a reasonable lawyer to know that confidentiality is "assumed and expected."<sup>61</sup>

What Ting may have "assumed and expected" may not be what Ted "assumed and expected." The Committee says that the reasonable lawyer will break the deadlock. If Ted were unreasonable in believing that Ting (on behalf of her client) did not expect confidentiality, then Ted impliedly promised and is bound. The difficulty here is that absent Ted's explicit promise or Ting's explicit waiver, Ted cannot know whether he is bound to confidentiality. Ted is required to guess whether a decision-maker will later find an implicit promise to protect Ting's client's information. This uncertainty is a strong incentive for Ted to raise explicitly the issue of confidentiality with Ting, and virtually guarantees that Ted and Ting will have to negotiate Ted's duties to Ting's client.

The Committee also bases its conflict-of-interest analysis upon Rule 1.6, perhaps unnecessarily so.<sup>62</sup> According to the Opinion, if Ted has not agreed to keep Ting's client information confidential, Ted will not have a conflict of interest under Rule 1.7 if he later learns the identity of Ting's client and agrees to represent a client adverse to Ting's client in a matter in which Ting's client's information may be used to her disadvantage.<sup>63</sup> Ted will not violate Rule 1.7(b)'s prohibition of "representation . . . materially limited by the lawyer's responsibilities . . . to a third person."<sup>64</sup> Ted's responsibility to Ting's client, a "third person" to Ted, arises only because of his promise, express or implied, to maintain confidentiality. The promise, according to the Committee, subjects Ted to a Rule 1.6 obligation. By emphasizing the centrality of the promise, the Committee seems to leave the client who has no promise, but merely a reasonable expectation of Ted's respect of confidentiality, without protection from Ted's adverse representation.

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<sup>61</sup> It would be educational to parse the situations when confidentiality is assumed but not expected, when it is expected but not assumed, when it is neither, and when it is both. Only in the fourth case is Ted's agreement inferred.

<sup>62</sup> See Op. 411, ¶ 24.

<sup>63</sup> See Op. 411, ¶ 18.

<sup>64</sup> MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.7(b) (1998).



## VIII. THE INCONVENIENCE OF AGENCY LAW

Without Ted's express or implied agreement, the Committee finds that there can be no violation of Rule 1.6 by Ted. Ted is free to disclose the information, or to use it against Ting's client.<sup>65</sup> Here, the Committee drops a disclaiming footnote to Section 428 of the ALI's Restatement of Agency Law.<sup>66</sup> The Restatement's position on sub-agency is that a principal's agent may, with the principal's express or implied authorization, appoint sub-agents, who are agents of the principal, and who owe fiduciary duties to the principal, even in the absence of contractual duties between principal and sub-agent. The principal's agreement giving rise to a sub-agent's duties to the principal may be express or implied.<sup>67</sup> Opinion 98-411's reference to the Agency Restatement expresses the Committee's belief that fiduciary duties arise only from express agreements. Opinion 98-411 has agency law upside down.<sup>68</sup> Of course, the Committee prefers that the fiduciary duties of a sub-agent attach only if Ting and Ted expressly agree. This further liberates the "quickie consult" from troublesome responsibilities that might discourage them. But wishing does not make it so. So, if Ted's agreement to maintain confidentiality is inferred from either circumstance (the consultation conditioned on confidentiality) or nature (information a reasonable lawyer would know is to be kept confidential), the Committee concludes without authority that an agency-based fiduciary duty of confidentiality does not arise. The possibility that Ted, because he is a sub-agent, has fiduciary duties of loyalty and confidentiality<sup>69</sup> toward Ting's cli-

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<sup>65</sup> See Op. 411, ¶ 18.

<sup>66</sup> See Op. 411, ¶ 18, and n.9; see also RESTATEMENT (SECOND) OF AGENCY, § 428 cmt. a (1958).

<sup>67</sup> RESTATEMENT (SECOND) OF AGENCY § 7 cmt. a, and § 79 (1958); HAROLD GILL REUSCHLEIN & WILLIAM A. GREGORY, THE LAW OF AGENCY AND PARTNERSHIP, § 22.C (2d ed. 1990).

<sup>68</sup> The Committee could mean to say that Ted's ethical, as distinguished from his legal, duties do not arise without express agreement. If so, then it seems inconsistent with other portions of the Opinion where ethical, as distinguished from legal, duties are seen to arise from Ted's implied agreement or even from Ting's client's reasonable expectation of Ted's maintaining confidentiality.

<sup>69</sup> See, RESTATEMENT (SECOND) OF AGENCY § 387 (1958) (agent may not take unfair advantage of his position in use of information acquired because of his agency); RESTATEMENT (SECOND) OF AGENCY § 391 (1958) (agent may not act on behalf of party adverse to principal in transaction related to his agency); RESTATEMENT (SECOND) OF AGENCY § 393 (1958) (agent may not compete with the principal concerning subject matter of his agency); RESTATEMENT (SECOND) OF AGENCY § 394 (1958) (agent may not act during the agency for person whose interests

ent complicates the picture considerably. Even without the expressed or implied agreement the Committee relies upon, the law of agency may be the source of the "responsibilities . . . to a third person" that may materially limit Ted's representation of an adverse client under Rule 1.7(b).<sup>70</sup> Moreover, if Ted fears a claim by Ting's client for breach of fiduciary duty arising from agency law, then Ted's own interests may also preclude representation adverse to Ting's client. Another non-hunting dog, it seems.

### IX. THE ALMOST ETHICS-FREE ZONE

As for the consultation which becomes "un-anonymous" when Ted later learns enough from other sources to connect the dots, the Committee rejects what it calls a "springing" duty of confidentiality under Rule 1.6.<sup>71</sup> Its reasoning is as circular as it seems. The only reason no duty arises later is because there was no duty before. No client-lawyer relationship exists, and therefore there is no duty. If Ted has not promised confidentiality, there is no duty. The fact that Ted later links Ting's information to an identified client is irrelevant.

The example the Committee uses is stark, even shocking. Ting consults Ted hypothetically about a tax question, without securing a promising of confidentiality. Later, a new client retains Ted to represent him in a divorce. In the initial interview, Ted realizes that the new client is the spouse of Ting's client in the tax consultation. The Opinion holds that Ted may represent the new client in the divorce, and may reveal or use Ting's client's information in the representation. Ted is not limited, even if hindsight clearly shows that Ting should have secured a promise of confidentiality or anticipated Ted's later identifying the client. The example drives a wedge between Ting and Ted. Tings learn always to secure a promise, while Teds learn never to give one.<sup>72</sup>

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conflict with those of principal in matters in which agent was employed); RESTATEMENT (SECOND) OF AGENCY § 395 (1958) (agent may not disclose or use confidences of principal given to agent on account of his agency to injury of principal); RESTATEMENT (SECOND) OF AGENCY § 396 (1958) (agent's duty of confidentiality continues after termination of agency). Comment c. to § 387 states that the above duties apply to a gratuitous agent as fully as to an agent who is paid for his services.

<sup>70</sup> Op. 411, ¶ 19.

<sup>71</sup> Op. 411, ¶ 18.

<sup>72</sup> See Op. 411, ¶ 18. If Ted reveals Ting's client's information, uses it, abuses it, or harms Ting's client by means of the consultation, the Committee's aim ap-

While Ted thus remains relatively free to undertake new representation, assisting Ting may impose obligations on Ted vis-à-vis his existing clients. To warn Ted to be cautious when talking to Ting, the Committee uses another example.<sup>73</sup> In it, Ted, who normally represents landlords is consulted by Ting who represents a tenant seeking to avoid an onerous lease. As the world turns, Ting's client is a tenant of Ted's client. Ted has harmed his client, even if unknowingly. The Committee delicately notes that, if the consultation becomes known, it "may well affect the consulted lawyer's relationship with her landlord client adversely."<sup>74</sup> The Opinion faults Ted's failure to "clear conflicts," even though there is no client-lawyer relationship with Ting's client. If the consultation was both anonymous and hypothetical, however, even the most effective conflicts-checking system would not sound the alarm. The Committee's concludes that if there was no agreement to keep Ting's client's information confidential, Rule 1.4 requires Ted to inform his client of the consultation and its possible consequences.<sup>75</sup> Leaving aside the delicacy of that conversation, possible consequences for Ted's client range from losing the case to, at the least, a weakened position costing more money and time.<sup>76</sup>

If Ted had agreed to keep Ting's tenant-client's information confidential, must Ted honor that agreement? The Committee position is that Ted "may have" to refrain from representing "a long-time client of the firm who wants the firm to pursue a breach of lease action."<sup>77</sup> While the Committee does not explicitly say so, Ted's law firm may also be unable to represent the client. The basis of Ted's obligation to decline representation is grounded in Rule 1.7(b),<sup>78</sup> thus Ted's firm too must send the client elsewhere under Rule 1.10(a). The Committee notes, not in this discussion, but a few paragraphs away, that neither Ted

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pears to be that Ted run afoul of no Rule. On the other hand, Ting's selection of Ted, her failure to secure a promise of confidentiality, or her not sufficiently masking the facts to disguise her client's identity, may be incompetence under Rule 1.1. See MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.1 (1998).

<sup>73</sup> See Op. 411, ¶ 20.

<sup>74</sup> Op. 411, ¶ 21. The words "mad as hell" come to mind, and not merely because they would come to Walter Steele's mind.

<sup>75</sup> See Op. 411, ¶ 21. If Ted had agreed to maintain confidentiality, Ted may not be able to inform his landlord-client of the problem at all.

<sup>76</sup> Possible consequences for Ted range from providing some legal services without a fee (to undo the damage) to losing the client altogether.

<sup>77</sup> Op. 411, ¶ 20.

<sup>78</sup> See MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.7(b) (1998).

nor his firm may be free to explain why they must decline to represent the landlord.<sup>79</sup>

Without an agreement of confidentiality with Ting, Ted, while less at risk, is still not home free. First, the Committee confidently asserts that Ted may be charged with violating Rule 1.7(b) for failure to employ reasonable measures to avoid conflicts of interest.<sup>80</sup> A bit curious, for Rule 1.7(b) does not, nor does any other Rule, except perhaps Rule 5.1(a), require a lawyer to take prophylactic measures to avoid violating a rule. To be sure, the first paragraph of the comment to Rule 1.7 advises a lawyer to adopt reasonable procedures,<sup>81</sup> but, as the first paragraph of the Scope note of the Model Rules makes clear, “[c]omments do not add obligations to the Rules.”<sup>82</sup> The Rules themselves generally address, frustratingly for some observers, only primary conduct, and rarely speak to avoiding potential violations of the Rules. Put more directly, as Walter Steele certainly would prefer, the Rule prohibits conflicted representation; it does not mandate “reasonable measures” to avoid conflicted representation. A lawyer who takes reasonable measures may still violate Rule 1.7. Is the Committee now saying that a lawyer who does not automatically violates Rule 1.7?

Second, the Committee warns Ted of malpractice exposure, and of his vulnerability to a motion to disqualify if he represents the landlord, even without his having agreed to confidentiality.<sup>83</sup> The Opinion fails to expand upon the basis of the malpractice claim. Perhaps malpractice law is a better source of a duty of reasonable care to avoid conflicts of interest, rather than an obligation added by interpretation to the Model Rules. The theory supporting a motion to disqualify would be that the information is “entitled to protection.”<sup>84</sup> In the absence of either a client-lawyer relationship, or a confidentiality agreement, express or implied, it is difficult to find a basis in ethics, if not in outrage, for Ting’s client’s entitlement.<sup>85</sup>

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<sup>79</sup> See Op. 411, ¶ 24.

<sup>80</sup> See Op. 411, ¶ 22.

<sup>81</sup> See MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.7, cmt. [1] (1998).

<sup>82</sup> MODEL RULES OF PROFESSIONAL CONDUCT, Scope [1] (1983).

<sup>83</sup> See Op. 411, ¶ 22.

<sup>84</sup> Op. 411, ¶ 22.

<sup>85</sup> Ting has a strong personal interest in winning this motion to disqualify. Ting’s failure to use these safeguards when consulting Ted may result in adverse use of Ting’s client’s information and a malpractice action against Ting.

The Committee's solution to the problem of the consultation that later becomes "un-anonymous" is, of course, prevention: the Opinion advises Ted to learn who Ting's client is and to check for conflicts before consulting.<sup>86</sup> Again, curious advice, when Ted is not forming a client-lawyer relationship with that person, and when the Committee elsewhere<sup>87</sup> endorses the hypothetical consultation. When an anonymous hypothetical is impossible, the Committee advises Ted to learn enough to be sure that the consultation matter does not affect an existing client.<sup>88</sup> In those cases where Ted commits to maintain confidentiality, Ted must also avoid later undertaking adverse representation. Therefore, Ted must include Ting's client within his own conflicts-checking system.<sup>89</sup>

The Committee further notes that no Rule 1.7(b) conflict would arise if Ted obtains Ting's agreement that the consultation will impose no obligation on Ted to Ting's client.<sup>90</sup> The conclusion of the opinion amplifies<sup>91</sup> this idea by suggesting that Ted obtain consent to "full" use of information gained in the consultation. A single clause in the Opinion's conclusion requires, almost as afterthought, that Ting be authorized by her client to make such an agreement.<sup>92</sup> Could Ting's authorization be implied, or must it be express? Given the breadth of implied authorization the Committee accepts in the confidentiality section of its discussion, we worry that the Committee would find an agreement based only on implied authority. If Ted is a careful lawyer, Ting will not be able to consult him without getting her client's advance consent.

## X. BEHIND THE SCREEN

To ease the blow of Ted's disqualification,<sup>93</sup> the Committee offers Ted's client, or rather Ted and his law firm, the consolation of screening. The ABA, and most states, do not permit a law firm to screen a member who is individually unable to represent a client because of a conflict of interest, at least without the

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<sup>86</sup> See Op. 411, ¶ 23.

<sup>87</sup> See Op. 411, ¶ 6.

<sup>88</sup> See Op. 411, ¶ 23.

<sup>89</sup> See Op. 411, ¶ 24. See *supra* notes 80-82 and accompanying text.

<sup>90</sup> See Op. 411, ¶ 25.

<sup>91</sup> Rather than recaps.

<sup>92</sup> Op. 411, ¶ 25.

<sup>93</sup> See *supra* notes 62-63 and accompanying text.

client's consent.<sup>94</sup> A footnote to the Opinion<sup>95</sup> suggests that, although a client or former client is not sufficiently protected by screening, a consenting "third person" may be. The footnote indicates that the screening option depends upon the non-client's consent to Ted's firm's adverse representation. Although this appears to be a special deal for non-client consultants, it is an illusion. While screening is not permitted "as a matter of right,"<sup>96</sup> clients and former clients may consent to screening as a condition to permitting adverse representation by a former lawyer.<sup>97</sup> So, now, non-clients can too. Big deal.<sup>98</sup>

In the Opinion's conclusion, the Committee reiterates that Ted's agreement to protect confidential information would limit his representation of a client with adverse interests.<sup>99</sup> Ted must obtain consent, but it does not specify whose. If comparable to a multiple-client conflict, then, to continue the adverse representation, Ted must secure the consent of both Ting's client and his client or prospective client.<sup>100</sup>

Whether or not screening is attempted, it is difficult to see how Ting's client's consent, in advance of Ted's, or Ted's firm's, later adverse representation can be adequately informed. "Consultation," as defined in the Model Rules, means communicating enough information for the client to appreciate the significance of the matter in question.<sup>101</sup> That this authorization for Ting to agree that Ted assume no obligation as a result of learning confidential information would be based on adequate consultation is at least pie in the sky.<sup>102</sup> Difficult as it is to

<sup>94</sup> See generally, ABA/BNA LAWYERS' MANUAL ON PROFESSIONAL CONDUCT, § 51:2001-14 (1999).

<sup>95</sup> See Op. 411 n.13.

<sup>96</sup> *Id.*

<sup>97</sup> If a former client "may consent to representation notwithstanding a conflict," as Comment [5] to Model Rule 1.7 notes, then she can condition that consent upon the screening of the conflicted lawyer.

<sup>98</sup> It may be a big deal, however, for Ting, whose failure to obtain a screening proviso may prove an actionable disservice to her client.

<sup>99</sup> See Op. 411, ¶ 26.

<sup>100</sup> MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.7, cmt. 5 (1998).

<sup>101</sup> MODEL RULES OF PROFESSIONAL CONDUCT, Terminology [2] (1998).

<sup>102</sup> The conversation might go something like this:

Atty: Now, I want to run this problem passed my lawyer friend, Walter Steele. He's an expert in this area and could be extremely helpful in how we decide to proceed.

Client: O.K. Sounds good. How much will it cost?

Atty: Nothing (except the fee for my time). I'm not going to retain him. The problem is, however, that he might not agree to discuss the case with me if I ask him to promise to keep what I tell him

conceive of a client agreeing, it is even more difficult to conceive of a lawyer who thinks her client will agree. To avoid nearly always futile attempts to obtain explicit authorization, Ting will rely upon implied authorization.<sup>103</sup> The Opinion's position therefore, will pressure Ting to make her question to Ted more general, less susceptible to later connection of information to client, and less effective. She should probably pray for a continuing legal education program on the topic. That is the kind of perverse consequence Walter Steele would relish.

## XI. THE END??

The conclusion does not merely summarize the body of the opinion, it occasionally adds new, undeveloped requirements. Lawyers should take "some or all" of these measures: (1) keep the consultation anonymous or hypothetical; (2) when actual client information is revealed, it should be limited to the least disclosure necessary for consultation;<sup>104</sup> (3) client consent must

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confidential and not to represent any clients against you where what I tell him could hurt you. He might be afraid that it will prevent him from representing other clients, now or in the future.

Client: That concerns me. I don't want what I've told you to get to the other side or to hurt me in the future. Can't you just tell him only what's already public.

Atty: If I do, I doubt I'll get advice that is worth much. I need you to agree that he is free to use whatever I tell him however he wishes? I'll try to disclose as little confidential information as possible.

Client: What's the chance the information could fall into the wrong hands or come back to hurt me later?

Atty: Well. . . . This lawyer, Steele, does not represent your opponent in this case and hasn't in the past as far as I know. Nor does he tend to represent folks with whom you might end up in litigation sometime in the future. But, of course, I cannot guarantee that he or his law firm will never end up in a law suit against you.

Client: Remind me again. Why would I want to agree that Steele doesn't have to keep my secret information confidential?

Atty: It may be the only way he'll agree to talk to me about the case.

Client: There's got to be other lawyers out there with whom you can consult on this issue who will agree to keep what you tell them confidential.

Atty: I guess so.

Client: So why haven't you found one?

<sup>103</sup> When a lawyer foregoes seeking explicit consent because she believes the client will not give it, it is illogical to conclude that the lawyer can reasonably infer that authorization is implied.

<sup>104</sup> The least possible disclosure "suggestion" is discussed nowhere else in the Opinion.

precede disclosure that might waive the privilege or harm the client; (4) the lawyer should not consult another lawyer who has represented the opposing party without making sure that the other lawyer will not be doing so in this case; (5) the lawyer should be careful if consulting another lawyer who typically represents clients on the other side of the issue from her client; (6) the consulted lawyer should ask the consulting lawyer if the latter knows whether the consulted lawyer or his firm has ever represented anyone who might be involved in the matter; (7) (perhaps inconsistent with the first suggestion) sometimes the consulted lawyer should ask the identity of the party adverse to the consulting lawyer's client; (8) the consulted lawyer should determine whether the information about to be imparted is to be kept confidential, and then decide whether to get more information so as to identify any conflict of interest; (9) the consulted lawyer should ask the consulting lawyer's client to waive any confidentiality or conflict-of-interest duty; and (10) the consulted lawyer should obtain the consulting lawyer's client's agreement to screen the consulted lawyer and permit the consulted lawyer's firm to undertake adverse representation.

## XII. THE FINAL? CRITIQUE

"You can't have it both ways," as the way above-average born skeptic and plain talker might say. Ted's goal is to be a gray-beard<sup>105</sup> with no inconvenient obligation to a (non-paying) client. The Opinion drives Ted to avoid disqualifying entanglements, thus to avoid either a formal relationship with Ting's client, or a promise<sup>106</sup> of confidentiality. Ting's client is driven to want either or both. Ting wants the help Ted can give, without harm to her client. Thus, Ting and her client want promises. Ted and his client want waivers. If there are no promises, Ting's general questions may not produce enough helpful information. The anonymous hypothetical may be slightly more productive. The identifying "hypothetical" or the hypothetical subject to springing identification<sup>107</sup> raises the danger of harm. Ting may have disclosed information beyond her implied authorization. Ted may find himself obliged by a prom-

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<sup>105</sup> We extend a pre-emptive apology to any possible honoree of this article who might take offense at the use of this term. It probably avails as much as a pre-emptive abstract waiver of adverse use of confidential information.

<sup>106</sup> Express or implied. See *supra* notes 54-64 and accompanying text.

<sup>107</sup> See *supra* notes 71-89 and accompanying text.



ise implied by the circumstances or the nature of the information.<sup>108</sup> The Opinion requires a pre-consultation dance, as intricate as the Cotton-Eyed Joe, between Ting and Ted.

### XIII. EPILOGUE

In Opinion 98-411, the Committee on Ethics and Professional Responsibility describes the ethical and practical concerns of lawyer-to-lawyer consultations. Unfortunately, the Opinion fails to craft clear guidelines for the profession. Concededly, the Committee embarked on uncharted waters<sup>109</sup> using its common ethical sense as its compass. We think, however, that the Opinion raises more questions than it answers. For example, Opinion 97-407 seems to be the embarrassing relative.<sup>110</sup> How does the Committee's advice in Opinion 98-411 relate to its advice of one year before? Should the formalistic test of engagement be the *sine qua non* of a client-lawyer relationship? For that matter, what constitutes "engagement?" It seems as if the Committee was unwilling to join issue between the closely related questions addressed by the two opinions. Another shortcoming of Opinion 98-411 is the vagueness of its implied authorization discussion. Does a lawyer reading the Opinion have clear guidance about what client information she can reveal when seeking another lawyer's advice? What difference does a lack of implied authority make if she gets the consulted lawyer's agreement to keep the information confidential? Finally, and this does not exhaust the list of open questions, how are the consulting and consulted lawyers to work out the exactly opposing advice the Committee gives to each? If both lawyers read and follow Opinion 411, they will have tough negotiating over the ground rules of the consultation. Is the loser acting unethically? We hope the Committee will soon revisit this important topic to address these questions.<sup>111</sup>

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<sup>108</sup> See *supra* notes 59-61 and accompanying text.

<sup>109</sup> Obviously not a Corps of Engineers lake.

<sup>110</sup> Rather than a fantastic spouse.

<sup>111</sup> Perhaps some retired professional responsibility professor who totes a notebook computer on the back of his motorcycle will write an article with all the answers.